STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 18, 2010
v	No. 294568 Oakland Circuit Court
JOSEPH MARTIN DEVINE, Defendant-Appellant.	LC No. 2009-226911-FH

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of three counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b). The trial court, applying a fourth-offense habitual offender enhancement under MCL 769.12, sentenced defendant to three concurrent terms of 25 to 40 years' imprisonment. We affirm.

Defendant's convictions arose from his ongoing sexual abuse of his long-term girlfriend. The victim had previously claimed that defendant forced her to have sex, but she attempted to retract this statement at trial.

Defendant argues that the prosecutor presented insufficient evidence to support his convictions.

> In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. [*People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).]

Moreover,

> [t]he standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. [*People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).]

Defendant was charged with engaging in sexual penetration using force or coercion. See MCL 750.520d(1)(b). In his sufficiency-of-the-evidence argument, defendant specifically contends that the prosecutor presented insufficient evidence of force or coercion. We disagree.

Detective Stacy Swanderski of the Farmington Hills Police Department testified that she spoke with the victim on May 6, 2009. Swanderski described the victim as "[c]rying, nervous, very small, frail, sickly in my opinion, gaunt." Swanderski stated that the victim told her that defendant awoke her at 3:00 a.m. one morning and proceeded to wash her vagina and digitally penetrate her. According to Swanderski, the victim stated that she was afraid of defendant, that he was very intoxicated at the time, and that his insertion of fingers was painful because of a recent surgery she had had for a torn cervix. The victim described the incident as "very aggressive" and a "forceful washing."

The prosecutor then engaged in the following colloquy with Swanderski:

> *Q.* And did she tell you whether or not she consented to these acts?
>
> *A.* She did not [sic]. She explained to me that she did not consent to this act because number one, she was awakened and she had no idea that -- even this was going to happen, and nor did she request it to happen.
>
> *Q.* All right. She asked for him to stop, but he did not stop?
>
> *A.* Correct.
>
> *Q.* And did she talk to you about anything else that happened?
>
> *A.* She then explained to me because I, again, asked about any other history of any other physical abuse or violence that had taken place. She explained to me since approximately 2007, there had been a number of times that he had forcefully made her give him a blow job.
>
> * * *
>
> *A.* Perform oral sex. He would come into the room. Again, her room, the bedroom she slept in and straddle her over top of her face area and forcibly take his hands and pull her by the hair and forcefully make her perform oral sex on him.

Swanderski testified that the victim told her that this forced oral sex occurred every other day since November 2007 and that she would write the word "Hell" on the calendar on the days that it occurred. Swanderski obtained a written statement from the victim describing the incidents; this statement was read into the record.

Mary-Lynn Britts, a friend of the victim, testified that she spoke with the victim on the morning of May 6, 2009. According to Britts, the victim stated that, the prior night, defendant gave her a "sitz bath" against her wishes and inserted his fingers in her. Britts testified that, in

the past, defendant would force the victim to have sex, and later the victim began to submit "to keep him quiet."

The victim testified that defendant "never forced [her] to have sex." However, she admitted that he "force[d] his fingers into [her] vagina" during the sitz-bath incident. She claimed that he stopped the sitz bath after she asked him to do so. She admitted that she had previously accused defendant of forcibly penetrating her mouth and vagina and had written a statement describing the incidents. She stated that she retracted those statements because "I want him to have his life back." The victim testified that defendant "can be mentally abusive to me. But after eighteen years, you get used to it."

Alison Hoffman, the victim's daughter-in-law, testified that she had witnessed defendant being "[v]ery verbally sexually abusive" towards the victim and demanding sex. Testifying for impeachment purposes, Hoffman stated that the victim told her, at various times, that defendant had forced her to have sex. According to Hoffman, the victim told her that defendant had been so aggressive with her one time during sex that the victim's cervix was torn and required surgery. Karen Maldonado, a friend of the victim, testified that she, too, observed defendant being verbally and mentally abusive towards the victim. Maldonado, testifying for impeachment purposes, stated that the victim told her multiple times that defendant had forced her to have sex with him.

The pertinent statute provides that

> [f]orce or coercion includes, but is not limited to, any of the following circumstances:
>
> (*i*) When the actor overcomes the victim through the actual application of physical force or physical violence.
>
> (*ii*) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.
>
> (*iii*) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.
>
> (*iv*) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable.
>
> (*v*) When the actor, through concealment or by the element of surprise, is able to overcome the victim. [MCL 750.520b(1)(f); see also MCL 750.520d(1)(b).]

In *People v Carlson*, 466 Mich 130, 140; 644 NW2d 704 (2002), the Court stated:

> To be sure, the "force" contemplated in MCL 750.520d(1)(b) does not mean "force" as a matter of mere physics, i.e., the physical interaction that would be inherent in an act of sexual penetration, nor, as we have observed, does it follow that the force must be so great as to overcome the complainant. It must be force to allow the accomplishment of sexual penetration when absent that force the penetration would not have occurred. In other words, the requisite "force" for a violation of MCL 750.520d(1)(b) does not encompass nonviolent physical interaction in a mechanical sense that is merely incidental to an act of sexual penetration. Rather, the prohibited "force" encompasses the use of force against a victim to either induce the victim to submit to sexual penetration or to seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim's wishes.

Here, there was clear evidence that defendant, on at least three occasions, sexually penetrated the victim by "induc[ing] the victim to submit to sexual penetration" or by "seiz[ing] control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim's wishes." *Id*. While contradictory evidence was introduced at trial, it was up to the jury to decide which testimony to believe. *People v Unger*, 278 Mich App 210, 228-229; 749 NW2d 272 (2008). Reversal is not warranted.

Defendant next argues that his sentences constituted cruel and/or unusual punishment. See US Const, Am VIII and Const 1963, art 1, § 16. We review constitutional issues de novo. *People v Swint*, 225 Mich App 353, 364; 572 NW2d 666 (1997).

Defendant had 11 prior felony convictions and 16 prior misdemeanor convictions. The sentencing guidelines produced a range for the minimum sentence of 117 to 320 months. The trial court sentenced defendant within the guidelines, to 25 to 40 years' imprisonment.

In *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008), the defendant argued that his sentence, which was within the guidelines, constituted cruel and unusual punishment. The Court stated:

> Defendant was sentenced within the sentencing guidelines range. Although MCL 769.34(10) provides that a sentence within the guidelines range must be affirmed on appeal unless the trial court erred in scoring the guidelines or relied on inaccurate information, this limitation on review is not applicable to claims of constitutional error. *People v Conley*, 270 Mich App 301, 316; 715 NW2d 377 (2006). However, a sentence within the guidelines range is presumptively proportionate, *People v Broden*, 428 Mich. 343, 354-355; 408 NW2d 789 (1987), and a sentence that is proportionate is not cruel or unusual punishment, *People v Drohan*, 264 Mich App 77, 92, 689 NW2d 750 (2004). [*Powell*, 278 Mich App at 323.]

Given defendant's lengthy criminal history and the nature of his current crimes, involving the repeated exploitation of a purported girlfriend, defendant has not overcome the presumption of proportionality. Therefore, no constitutional violation occurred. *Id*. at 324.

In a supplemental brief on appeal, defendant argues that his trial attorney was ineffective in failing to move to suppress inadmissible evidence. Defendant, however, utterly fails to identify the evidence in question and has therefore abandoned this appellate issue. See *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

Defendant also argues that his trial attorney was ineffective in failing to object to Detective Swanderski's testimony that the victim, when describing the crimes, was "[c]rying, nervous, very small, frail . . . in my opinion." Defendant also mentions Swanderski's testimony that the victim was "visibly shaken" and "Very gaunt. Sickly looking. Crying. Upset, visibly upset. That something was wrong." He also mentions Swanderski's testimony that the victim was "very nervous" and that Swanderski "could tell [the victim] was afraid initially to speak about things . . . ."

> To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. [*People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (emphasis in original).]

Defendant contends that Swanderski's testimony constituted improper opinion testimony concerning defendant's guilt. This assertion is utterly without merit. Swanderski was testifying regarding the victim's demeanor and did not express an opinion regarding defendant's guilt. Swanderski's statements were admissible as direct observations, as opinions under MRE 701 (dealing with opinions of lay witnesses) or as foundational testimony under MRE 803(2) (dealing with excited utterances). Counsel's actions did not fall below an objective standard of reasonableness under prevailing professional norms, and defendant has not overcome the presumption of effective assistance. *Id*.

Lastly, defendant argues that the trial court violated defendant's due process rights by "failing to give a proper cautionary instruction" and "ha[ving] empanelled an anonymous jury." Defendant does not identify the cautionary instruction that he believes should have been given, nor does he explain why he believes the jury was "anonymous." Defendant has abandoned this issue due to inadequate briefing. *Martin*, 271 Mich App at 315.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro